McLellan v. *McLellan*:[1] Family Law—Division of Non-Family Assets

Since the *Marital Property Act*[2] came into force on January 1, 1981, the interplay between it, and certain common law doctrines, is as yet unclear. A recent comment in this Journal notes that:

> Perhaps the best view is that the statute will prevail where there is any conflict between the common law and the statutory provisions. The issue is complicated by the fact that the reform legislation in both Ontario and New Brunswick was enacted before the Supreme Court in *Becker* v. *Pettkus* adopted the principle of constructive trust as it relates to marital property. Therefore, a question arises as to whether the codification of resulting trust in section 15 of the New Brunswick Act excludes by implication the use of constructive trust in relation to property disputes between married persons in New Brunswick[3]

The case under review here, however, suggests that our M.P.A. is not a complete code, and that restitutionary common law concepts are very much alive with respect to property division in the marital forum.

Eileen and James McLellan were married in 1971 and separated in 1977. For the first three years, both were bank employees and presumably, both contributed regularly to the family income. The husband left the bank in 1974 to start a shoe business which the wife helped to finance. The business was evidently rather short-lived as, at trial, Logan J. pointed out "that the husband was neither very ambitious nor very diligent. He drank and used drugs; he kept pornographic material in the house."[4] In delineating the facts of the case, the trial judge makes it crystal clear that the wife was the major breadwinner for the greater part of the marriage. Some time near the beginning of the marriage, the husband befriended an elderly widow, with no close family, named Mrs. Steen. Over the next five years the McLellans helped Mrs. Steen on a daily basis, and the relationship developed to the point where the McLellans and their child moved in to the Steen home around January, 1977.

It is also clear from the judgment that the wife, in addition to her full-time job, did the housework, cooked the meals, and ran most of the errands. The husband, on the other hand, was Mrs. Steen's companion, and their drinking together was "regular and substantial."[5] In April of 1977 the wife left the Steen home with the child, feeling that the environment was not conducive to bringing up a youngster. Shortly afterwards, the husband and wife divided the marital property amicably. Mrs. Steen died in February

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[1] Not yet reported, Oct. 28, 1983 (N.B.C.A.)

[2] S.N.B. 1980, c.M-1.1, hereinafter called the *M.P.A.*

[3] *E.L. Derrah, "Leatherdale* v. *Leatherdale*: A Case Comment," (1983) 32 U.N.B.L.J. 281 at 284.

[4] Not yet reported, March 28, 1983 (N.B.Q.B.), at 7.

[5] *Ibid.*

of 1980, a will having been executed several months before the McLellans separated, which left an estimated $200,000 to the husband.

The petition by the wife in December of 1981 was, *inter alia*, for a division (of the husband's inherited assets) under the *M.P.A.*. Logan J., construing s.1 of the Act, held that the Steen inheritance was neither a "family asset" nor "marital property". He then proceeded to award the wife 25 per cent of the husband's inheritance under s.8 of the Act, or alternatively, on the principle of resulting trust. The relevant parts are as follows:

> 8. In determining any *application for a division of marital property* [emphasis added] the Court may make a division of any property of either spouse that is not marital property where
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> (b) the result of the division of marital property would be inequitable in the circumstances having regard to
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> (i) the considerations set out in paragraphs 7(a) to (f)
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> 7. Notwithstanding sections 2, 3 and 4, the Court may make a division of marital property resulting in shares that are not equal if the Court is of the opinion that a division of the marital property in equal shares would be inequitable, having regard to
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> (f) any other circumstances relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of marital property to be in equal shares.

Counsel for the wife asked that the principles of constructive and resulting trust be considered on her behalf. The unjust enrichment of the husband and the original common intention that both spouses would share in any gifts from Mrs. Steen prompted the trial judge to find that a resulting trust arose in favour of the wife. He then found it unnecessary to deal with the question of constructive trust.

An alternative application by counsel for the wife under s.42 of the *M.P.A.* was rejected by the trial judge. The argument was based on the rationale of *Leatherdale* v. *Leatherdale*[6] where the Supreme Court of Canada considered sections 4 and 8 of the Ontario *Family Law Reform Act*[7] (similar to our sections 3-8 and 42 respectively) in order to make a division of non-family assets. This application was denied because of our exclusionary subsection 42(8).

> An application shall not be made under subsection (1) with respect to any property where an application or an order has been made respecting that property under Part I [which includes s.8].

The equivalent to this subsection only exists in the Ontario statute in regard to the scheme embodied in Ontario's, section 4; and does not exist in regard to Ontario's, section 8. Thus, the analogy to the Supreme Court ruling

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[6](1982), 45 N.R. 40 (S.C.C.)

[7]S.O. 1978, c.C-2.

which allowed a division of non-family assets *where the marital property had already been settled*, was held to be inappropriate.

Unhappy with the award of 25 per cent under s.8 of the *M.P.A.*, or under resulting trust, the husband launched an appeal (to have it reduced) and the wife launched a cross-appeal (to have it increased). Speaking for the New Brunswick Court of Appeal, LaForest J.A. rightly pointed out that the trial judge erred in applying s.8, as that section can only be invoked where there is an "application for a division of *marital* property". Evidently, no such application was made at trial, as the marital property had already been settled in 1977. The Appeal Court held that the petition properly fell under s.42 (since the application under s.8 was invalid) as the wife was an "interested person" within the terms of that section. In dismissing the appeal and the cross appeal, the Court held that it was unnecessary to justify the division on the basis of resulting or constructive trust.

From a procedural point of view, two remarks of the Court of Appeal should be noted here. First, the Court felt that

> In the present case, the application should have been made for a division of marital property, following which the court could in its discretion effect a division of non-marital property.[8]

The conclusion that one would logically draw from this is that, regardless of the disposition of the marital property, where *any* property in a dispute is unsettled at the time of the petition, the initial application should be made for a division of marital property which would allow s.8 to be applied. Second, the Court noted that where no application *has been made* for a division of marital property; s.42(8) does not operate as a bar to *concurrent applications*.

The restitutionary concepts did not ultimately serve as a basis for the division in this case, however, the importance of pleading them should not be overlooked. The recent decision of the Supreme Court of Canada in *Palachik and Palachik* v. *Kiss*[9] is also authority for this. In that case, the wife purchased the matrimonial home (an apartment building in which they occupied the ground floor) with her own money, and made an agreement with the husband that he would pay her $100.00 per month until his half of the purchase price had been contributed. The deed was then to be changed to one of joint ownership. The difficulty here, arose when she died *three years before* Mr. Kiss was to make his final payment; and her heirs were reluctant to part with that share of her estate which was enriched by the husband's monthly payments and carpentry skills in renovating the building. Although the husband's application under the Ontario *Family Law Reform Act*[10] had

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[8] *Supra*, footnote 1.

[9] (1983), 33 R.F.L. 225 at 229.

[10] Supra, footnote 7.

> no application to the estate of a deceased spouse or former spouse unless both are living at the time of the institution of the proceedings, the return of Frank's [the husband's] monthly payments was supportable on the basis of constructive trust and the award in respect of his work and services on the basis of both constructive trust and the Succession Law Form Act.[11]

Whereas *Palachik and Palachik* v. *Kiss* does not directly answer the question (of whether or not a marital property regime excludes the common law doctrines) which was left open by Laskin C.J. for the Court in *Leatherdale* v. *Leatherdale*; it does clearly indicate that in any situation which does not come within the purview of *a* marital property act, the common law doctrines of resulting trust, constructive trust, contract, quasi-contract, unjust enrichment, and quantum meruit should all be canvassed.

When one considers the *McLellan*, *Leatherdale* and *Palachik* decisions together; particularly in view of the New Brunswick Court of Appeal's censure of the method of pleading at trial in McLellan;[12] *any* application for division of property between spouses should include sections 3-8 and section 42 of the *M.P.A.*, *and all* restitiutionary concepts for which there is a factual basis.

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[11]Supra, footnote 9, at 229. It should be noted here that in New Brunswick, the *M.P.A.* (s.4) *does* apply on the death of a spouse.

[12]See the quotation to which footnote 8 refers.

*B.Ed. Hon. 1982 (U.N.B.), L.L.B. Candidate (U.N.B.) 1985.